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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KENNETH KETNER, Defendant.	CASE NO. SA CR-05-36JVS **OBJECTIONS TO USE OF UNCORROBORATED HEARSAY AND UNRELIABLE ALLEGATIONS IN CONNECTION WITH SENTENCING** Date: July 2, 2007 Trial Date: May 30, 2006

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MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

The Constitution requires that a defendant's sentence be based on accurate reliable information. Mr. Ketner has committed a crime and is prepared to be sentenced by this Court. But he has a right to have the Court impose a sentence that is based on demonstrable fact rather than conjecture or fiction. Unfortunately, most of the "facts" upon which the PSR and the Government's Sentencing Memorandum – to the extent those facts depart from the settled record of the Plea Agreement – are simply wrong. The Government and the Probation Officer rely almost entirely on uncorroborated hearsay statements from co-conspirators or other self-interested witnesses. The statements of these witnesses – presently uncritically as factual bases for enhancing Mr. Ketner's sentence – are inherently unreliable, and on many instances, demonstrably inaccurate. The Government has clearly not attempted to corroborate the assertions, because if it had, it would have learned the truth and would not have presented these positions. Given that these witnesses have not testified under oath and have not been subjected to cross-examination, their self-serving statements are inherently unreliable.

II

DISCUSSION

A. Reliance Upon Inherently Unreliable Hearsay Statements To Establish A Sentencing Enhancement Is A Violation Of Due Process.

"[A] defendant clearly has a due process right not to be sentenced on the basis of materially incorrect information." *United States v. Petty*, 982 F.2d 1365, 1969 (9th Cir. 1993), amended on denial of reh'g, 992 F.3d 1015 (9th Cir. 1993). When a sentencing factor has a disproportionate impact on the sentence, due process requires that the Government prove the facts underlying the sentence by clear and convincing evidence. *United States v. Jordan*, 256 F.3d 922, 930 (9th Cir. 2001).

In *United States v. Huckins*, 53 F.3d 276 (9th Cir. 1995) the Ninth Circuit held that reliance upon uncorroborated hearsay or other unreliable grounds to enhance a defendant's sentence violates a defendant's due process right to fair and reliable sentencing and thus constitutes an abuse of discretion by the sentencing court. *Id.* at 279-80.

When a probation report or the Government's sentencing memorandum relies upon hearsay statements by alleged co-conspirators or accomplices or similarly biased individuals whose statements are not subjected to cross-examination under oath, those statements are inherently reliable and may not properly serve as the basis for a sentencing enhancement absent independent corroboration by other, inherently reliable evidence. *Huckins*, 53 F.3d at 279 (accomplice's statement not made under oath and subject to cross-examination at trial is not "inherently reliable"); *Jordan*, 256 F.3d at 932-93 (PSR's reliance upon hearsay statements made to police officer by accomplice fails to meet "inherently reliable" standard); *United States v. Corral*, 172 F.3d 714, 715-16 (1999) (PSR's reliance upon uncorroborated statements by co-defendant renders it inherently unreliable).

Similarly, reliance upon factors not supported by clear and convincing evidence –much less on conclusions flatly inconsistent with the available evidence – constitutes a violation of due process. *Jordan*, *supra*; *Petty*, *supra*.

B. The PSR And The Government's Memorandum Rely Almost Exclusively On Inherently Unreliable – And Often Demonstrably False – Hearsay Statements In Recommending Sentencing Enhancements and Characterizing The Offense Conduct.

Virtually all of the sentencing enhancements recommended by the probation officer in this case lack any basis in inherently reliable evidence. In most instances, the PSR does not even identify the purported evidentiary basis for its frequently inaccurate factual assertions. It is apparent, however, that the PSR in most instances has simply repeated allegations from alleged accomplices or otherwise tainted

witnesses incorporated in investigative reports prepared by the FBI. None of these statements are under oath, and none have been subjected to cross-examination by defense counsel. Because there is no inherently reliable foundation for the PSR's (often grossly inaccurate) conclusions, these conclusions fail the Ninth Circuit's well-established "inherent reliability" test and cannot properly be used as the basis for sentencing enhancements. *Huckins*, *supra*; *Corral*, *supra*. In other instances, the PSR simply misreads or misstates the established evidence, in violation of established Constitutional requirements. *See Petty*, *supra*.

Mr. Ketner recognizes that the Probation Office will not always be in a position to conduct a full investigation, and that the Court must rely to a significant extent on the Probation Office's analyses. But in this case, the Government and the Probation Office have maintained their unsupportable positions while simply ignoring critical evidence that has been pointed out by Mr. Ketner's counsel.

It bears repeating that Mr. Ketner admits that he committed crimes and deserves to be punished. But it is appropriate for him to attempt to ensure that his sentence is based on an accurate view of the facts. The fact that Mr. Ketner has admitted his crime should not permit other culpable individuals to falsely shift even more blame to him.

To that end, Mr. Ketner has repeatedly directed the Government and the Probation Officer to bankruptcy records and other clearly reliable evidence contravening the assertions made in the PSR. Mr. Ketner also submitted extensive objections to the PSR and detailed forensic reports illustrating the true factual circumstances of the criminal conduct at issue. The Laffer Report, attached as Exhibit A to Mr. Ketner's Sentencing Memorandum, details the many demonstrable factual errors incorporated in the analyses of the PSR and the Government's memorandum. For the Government and the Probation Office to simply stand on their mistaken positions without even addressing those materials is unreasonable.

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1. The Characterization of Mr. Ketner's Pre-MCR Conduct Is Demonstrably Wrong But Probation Has Refused to Amend the PSR.

The Government in its Sentencing Memorandum makes the prejudicial and unsupportable assertion that Mr. Ketner participated in fraudulent real estate activities before he began working at MCR. These assertions are based entirely on inherently unreliable, uncorroborated – and demonstrably inaccurate – hearsay allegations. As such, their use is improper and any reliance upon such allegations would constitute a violation of Mr. Ketner's due process rights.

First, the Government cites the hearsay statements of "Tami Ruffoll", who called the prosecutor after hearing about Ketner's indictment on the radio. (See Government's Sentencing Memorandum at 3.) Ruffoll reportedly claimed that Ketner worked with her at GMAC Mortgage in "1981 or 1982", and that during that period borrower information was misstated to increase the likelihood of loan qualification. She further claims that she reported Mr. Ketner's purported misconduct to GMAC's senior management, leading to Mr. Ketner's termination from GMAC "three weeks later", and that Mr. Ketner threatened her as a result. *Id.*

In fact, Mr. Ketner did not work out GMAC during the period the person identifying herself as "Tami Ruffoll" claimed. Mr. Ketner only worked at GMAC years later, from 1984-87. *See* Exh. A hereto. Mr. Ketner's ultimate departure from the company had nothing to do with purported fraudulent activity. Indeed, litigation arising from the termination of Mr. Ketner's employment resulted in a settlement in excess of $100,000 payable to Mr. Ketner.

Second, the Government relies upon the demonstrably false hearsay statements of Roberta Martin to falsely suggest that Ketner installed Martin as the "figurehead President" of an entity known as California Mortgage Corporation ("CFC") "in the mid 1990s", and then immediately caused CFC to file for bankruptcy so that he could form MCR. The Government also blithely adopts

Martin's uncorroborated claims that "[a]fter the bankruptcy, . . . HUD conducted an audit and discovered that many of CFC's HUD insured loans were fraudulent, and that Martin has held personally responsible to HUD for $200,000 worth of losses as a result. *See* Government's Sentencing Memorandum at 4.

Martin's uncorroborated hearsay statements, blindly accepted and relied upon by the Government, are in fact demonstrably false. CFC did not file for bankruptcy so that Ketner could form MCR. In fact, MCR was formed on or about July 6, 1995. CFC filed for bankruptcy approximately *four years later*, in April 1999. Exh. B. Nor did the HUD audit occur after the bankruptcy filing. The HUD audit was *completed* in early 1997, approximately two years *before* CFC's bankruptcy. That audit resulted in a settlement statement containing no admissions or findings of fraud and with all repayment obligations explicitly borne *by Ketner, not Martin.*[1] *See* Exh. C.

In short, the self-exculpating story told by Martin and parroted by the Government is riddled with demonstrable inaccuracies. That Martin would lie and try to minimize her role at Ketner's expense is not surprising, given the substantial evidence that Martin properly bears significant culpability. In addition to Martin's serving as President of CFC for the four years leading up to its bankruptcy, documentary evidence – apparently ignored by the Government – shows that Martin was personally involved in substitutions of trust deeds and full reconveyances and in the provision of NSF checks to borrowers while at MCR. *See* Exh. D. Moreover,

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[1] Martin claims that she followed Ketner to MCR only to ensure that the HUD settlement would be paid, and that she left MCR as soon as that obligation was satisfied. This story makes no sense, of course, given that Martin's claim that she was deemed personally responsible for the HUD settlement is demonstrably false. But in any event, the final payment on the HUD obligation was made in April 2000, but Martin did not resign from MCR until some six months later, on October 13, 2000. Exh. E.

the documents ignored by the Government include several checks written by Martin to herself and Ron Martin against Ketner's personal checking account. Witnesses have testified under oath that Martin would sign Ketner's name without permission. Martin also caused additional payments to be made to herself from corporate accounts, and never caused a Form 1099 to be issued for those payments. Exh. F.

In other words, Martin's statements are paradigmatic self-absolving statements by a co-conspirator. Critically, the PSR relies on Martin not only to mischaracterize Ketner's pre- and post-MCR conduct, but as the basis for the PSR's recommendation of a four-level "leadership" enhancement. Given the inherently unreliability – indeed, the demonstrable falsity – of these hearsay statements, they cannot properly be considered as a basis for enhancing Ketner's sentence.

2. The Recommendation of a Four-Level "Leadership" Enhancement Is Based on Unreliable Hearsay

The government and the Probation office rely heavily on self-exculpating statements from Robert Luby, who was MCR's CEO throughout the relevant time period. In the interviews and statements Luby provided to the government – none of which, of course, were subjected to cross-examination – he repeatedly distorted the facts to deflect blame and attention away from himself and onto Ketner. To give a single, telling example: Luby apparently told the FBI on March 27, 2001 that the sale of Ketner's interest in stock of MCR to an entity know as PL Miller, LLC (named after Luby's wife, Pam Miller) never occurred, and that PL Miller never had a back account or participated in any financial transactions. (March 27, 2001 FBI Report.)

This assertion is flatly contradicted by Luby's own sworn statements given in other contexts (*i.e.*, when it served his interest to tell a different story). In an August 13, 2001 declaration given by Luby to counsel for Household, Luby stated under oath that the Common Stock Purchase Agreement was executed, that the transaction occurred, and that payments were received by PL Miller in connection therewith.

Additional misstatements and contradictions by Luby are detailed in the Laffer Report at pages 22-25.

The government and Probation Officer appear to rely heavily on hearsay statement made by co-defendant Allen Johnson in his interviews with the FBI. As a defendant, Johnson's incentive to minimize his own culpability by exaggerating Mr. Ketner's role in the offense conduct is obvious. Although the government suggests that Johnson had recently been admitted to the bar at the time of the offense conduct and thus was unsophisticated, Johnson was in fact an experienced real estate investigator who played a major role – often without Ketner's knowledge or approval – in the underlying events. See Laffer Report at page 13, fn. 9.

For example, in an effort to minimize his own role and shift responsibility to Mr. Ketner, Johnson claimed that he never provided legal advice or representation to MCR or Mr. Ketner and "never opened a client file on Ketner." In fact, contemporaneous documents prove that Johnson represented on multiple occasions that he was legal counsel to both MCR and Ketner, and provided legal advice to both. Moreover, even a cursory review of the available documents reveal that Johnson was providing legal approval for MCR transactions – and generating substantial invoices for legal services rendered.

The PSR also relies heavily on self-serving hearsay statements by individuals such as Sal Benicosa – individuals who clearly sought to minimize their own responsibility at Mr. Ketner's expense. As extensively demonstrated in the Laffer Report, Benicosa was in fact a central figure in MCR's collapse. *See* Laffer Report at pp. 16-22. The Government and the PSR similarly rely on self-serving hearsay statements from Kevin Bonds, who was the President and Chief Executive Offices at Home ZipR. Contemporaneous documents clearly demonstrate Bonds' active role in managing the operations of MCR's Atlanta office – in direct contradiction of Bonds' claim that he had little direct involvement in the company's operations. Exh. G.

3. The Government And PSR Rely on Inherently Unreliable Hearsay In Proposing a Grossly Inflated Loss Amount

In order to hypothesize a loss amount of over twelve million dollars, the PSR relies upon transactions that have nothing to do with the offense conduct and do not represent criminal losses by any party. As discussed in Mr. Ketner's Sentencing Memorandum and the Laffer Report, the PSR's analysis lacks a valid basis in fact, and in fact, is grossly inflated. Reliance upon such inherently unreliable – and demonstrably false – supposition in connection with sentencing is clearly improper. *Huckins*, *supra*.

III

CONCLUSION

For all of the foregoing reasons, the Court should strike all factual assertions in the PSR and the Government's Memorandum based on hearsay statements from the record, or in the alternative schedule an evidentiary hearing at which the government must establish through live testimony those facts beyond the Plea Agreement upon which it contends the Court should rely for sentencing purposes.

DATED: June 22, 2007

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